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No. 91-1146

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNIONAMERICA INSURANCE COMPANY LTD. and CONTINENTAL REINSURANCE CORPORATION (U.K.) LIMITED, *ET AL.*,

Petitioners,

—against—

STATE OF CALIFORNIA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This Court should not allow the respondent plaintiffs' combined response to the two antitrust standing petitions arising from these cases to obscure the questions separately presented by this petition. Unlike the petition filed by Winterthur Reinsurance Corporation of America, No. 91-1131, this petition addresses claims alleging conspiracies that include only London-based reinsurers—and not the primary insurers from whom plaintiffs purchase. It presents issues the plaintiffs have virtually admitted are worthy of review, and it presents those issues at a stage and on facts that fairly pose those issues for decision.

As to the claims raised in this petition, there is no "[d]ispute[ ] over case characterization" and no "mischaracterization of plaintiffs' complaints." Br. Opp. 7, 25. The complaints explicitly state that the plaintiffs sue as purchasers of primary insurance, that the primary insurers from whom they purchase in turn purchase reinsurance from reinsurers, and that the reinsurers in turn purchase retrocessional reinsurance from retrocessional reinsurers. It is undisputed that the conspiracies alleged in the London-reinsurer claims occurred only in the London reinsurance or retrocessional reinsurance markets, in which plaintiffs are *not* consumers, and only among entities operating in those markets. The factual allegations underlying this petition therefore differ fundamentally both from those underlying the Winterthur petition, which addresses claims alleging conspiracies among both primary insurers and reinsurers, and from the characterizations of the claims relied upon by plaintiffs in their brief in opposition.

The Ninth Circuit held that even though "the action of the reinsurers took effect through the primary insurers," the plaintiffs had established standing simply by alleging that the impact upon them was nonetheless "direct." The Ninth Circuit reached this result by including antitrust injury as one factor among several to be balanced in order to determine plaintiffs' standing. The Ninth Circuit's holding and analysis

are flatly inconsistent with this Court's teaching and, unless corrected by this Court, will undermine the important policies advanced by antitrust standing doctrine.

I. Plaintiffs Do Not Deny the Need for this Court to Clarify that Antitrust Injury and Directness Are Independent Requirements of Antitrust Standing

This Court's failure definitively to establish antitrust injury and directness as separate and independent elements of a single standing requirement—both of which must be satisfied by an antitrust plaintiff—"has bred much confusion in the lower federal courts." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1451 n.20 (11th Cir. 1991); *see also Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988); *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1201 (7th Cir. 1986); Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1512 (1985). Plaintiffs do not deny that this confusion exists or that it warrants this Court's attention. In fact, their own submission reflects the confusion by listing "the nature of plaintiffs' injury, *i.e.*, antitrust injury" as one of a series of *Associated General Contractors* factors that must be weighed to determine standing. Br. Opp. 27 n.35. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537 (1983). Plaintiffs suggest, however, that these cases do not provide an appropriate occasion to eliminate the confusion because the Court of Appeals held that "plaintiffs satisfied both requirements." Br. Opp. 29.

Plaintiffs' suggestion simply ignores the reasoning of the Court of Appeals. The Court of Appeals' erroneous inclusion of antitrust injury as a factor to be weighed in the directness inquiry plainly contributed to its otherwise inexplicable determination that plaintiffs have standing to sue reinsurers from whom they admittedly were not direct purchasers and who sold products (reinsurance and retrocessional reinsurance)

that plaintiffs could not buy. UA App. A20-21.[1] This Court should therefore take the opportunity to correct the Ninth Circuit's analysis—and that of some other courts of appeals, Pet. 13 & n.14—to confirm that a finding of antitrust injury is the starting point for an inquiry into standing, not a factor in that inquiry. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986); *Todorov*, 921 F.2d at 1451 n.20.[2] At the same time, the Court should remedy the Ninth Circuit's evisceration of the directness requirement itself.

II. Plaintiffs' Brief in Opposition Confirms the Need for this Court to Undo the Ninth Circuit's Redefinition of the Directness Requirement

Plaintiffs argue that petitioners improperly "focus attention on activities in the reinsurance market," while plaintiffs "plainly allege . . . that the reinsurers' boycotts restrained the *primary insurance* market in which the plaintiffs are consumers." Br. Opp. 25 (emphasis in original). This argument simply misses the point. The object of the directness inquiry is not to determine whether the market in which plaintiffs participate was restrained (which is the object of the antitrust injury inquiry), but whether the plaintiffs are the parties that

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1 Since its decision in this case, the Ninth Circuit has continued to include the antitrust injury "factor" in its directness inquiry. *See Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1162 n.4 (9th Cir. 1991) (listing the "nature of the plaintiff's claimed injury" as one of five factors to consider).

2 Because plaintiffs also sue for injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26, the questions presented by this petition also afford an opportunity to clarify the directness showing that a plaintiff must make in order to have standing to pursue injunctive relief. *See Cargill*, 479 U.S. at 111 n.6 ("[s]tanding analysis under § 16 will not always be identical to standing analysis under § 4"). Because the plaintiff states also bring claims as *parens patriae* on behalf of their general welfare and economy, these cases also afford the opportunity to clarify the requirements for *parens patriae* standing in light of modern antitrust standing doctrine. *See Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945).

can most efficiently sue the entities responsible for the restraint. Pet. 9, 15-16, 19-21. Here, plaintiffs readily admit that they are not the "initial victims" of the alleged anticompetitive behavior. Br. Opp. 27. They allege, instead, that the restraint in the market in which they participate was only the indirect result of a restraint imposed against an upstream class of economic actors in a market in which plaintiffs do not participate.

Plaintiffs' own characterization of their claims shows that they cannot satisfy the directness requirement. While plaintiffs' description of reinsurance as an "input" into insurance seriously oversimplifies the nature of reinsurance coverage, it accurately captures the market relationships relevant to plaintiffs' claim for standing. To quote plaintiffs:

> Agreements between insurers and reinsurers are akin to purchase and sale agreements between vertically related firms in any other industry. Reinsurance is an input into insurance, the finished product. An insurer purchasing reinsurance is like Chrysler purchasing steel. Both transactions secure inputs into the finished product.

Br. Opp. 15 n.16. It could not be plainer that a purchaser of a Chrysler automobile would not have standing to sue Chrysler's suppliers of steel on the ground that a price-fixing conspiracy among those suppliers had inflated the price of the automobile. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *Associated General Contractors*, 459 U.S. at 541; *Kansas v. Utilicorp United, Inc.*, 110 S. Ct. 2807, 2812 (1990). It is equally plain that these purchasers of primary insurance do not have standing to sue reinsurers on claims that conspiracies involving only reinsurers inflated the price of primary insurance or restricted the terms on which it would be available. Because the Court of Appeals redefined the directness requirement to permit such a suit, this Court should grant the writ.

Finally, plaintiffs suggest that this Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), which the Court of Appeals did not cite or discuss, supports their

claim for standing. In *McCready*, however, the Court accorded standing to a plaintiff who alleged "that she was a consumer of psychotherapeutic services" and had been injured by a conspiracy between a society of psychiatrists and a group health plan "to restrain competition in the market for such services." *Associated General Contractors*, 459 U.S. at 538 (footnote omitted); *see McCready*, 457 U.S. at 467, 469 n.4, 479-80 & n.17, 481. Unlike plaintiffs here, Mrs. McCready had standing as a consumer in the *directly* restrained market.

Plaintiffs' misuse of *McCready* illustrates the need for this Court to clarify this area. Like *Associated General Contractors*, the *McCready* decision "actively confused the discrete questions of antitrust injury and standing." Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1506 (1985).[3] Indeed, the Ninth Circuit has misapplied *McCready* to "establish a new dimension of liability" not contemplated by *Associated General Contractors*. *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 749 (9th Cir. 1984) (Kennedy, J., dissenting), *cert. dismissed*, 469 U.S. 1200 (1985).[4] To the extent the decision below implicates the *McCready* decision, it is that much more important that this Court review it.

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3 *See also* Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury and Evidentiary Sufficiency*, 75 Va. L. Rev. 1221, 1270-71 (1989).

4 In particular, the courts of appeals have taken divergent views of the *McCready* Court's discussion of "inextricably intertwined" injury and its relationship to antitrust standing. *Compare Peck v. General Motors Corp.*, 894 F.2d 844, 847 (6th Cir. 1990) (to succeed on "inextricably intertwined" theory of *McCready*, plaintiff must show that it was used as a "fulcrum, conduit or market force to injure competitors or participants in the relevant product or geographical markets") *with State of South Dakota v. Kansas City Southern Indus.*, 880 F.2d 40, 48 (8th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990) (analyzing whether plaintiff had a "symbiotic relationship" with the direct victim to determine whether its injury was "inextricably intertwined").

III. The Global Conspiracy Claim Is Irrelevant to the Present Petition

In a final attempt to skirt the issues raised by this petition, plaintiffs suggest that their global conspiracy claim solves any standing problems they might otherwise face. Br. Opp. 28-29. But the global conspiracy claim was dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, and the Court of Appeals affirmed that dismissal. It is therefore neither addressed by this petition nor relevant to the issues raised.[5]

Surely the failure to state a claim pursuant to Rule 12(b)(6) is no mere "technical problem[ ]." Br. Opp. 28 n.37; *see also* Br. Opp. 22 n.27. And the direction of the Court of Appeals that the District Court grant plaintiffs leave to replead provides no guarantee that plaintiffs will succeed in doing so. Though the product of a two-year precomplaint investigation, UA App. A58, A82, the complaints as filed include not a single concrete allegation linking the London reinsurer conspiracies addressed by this petition with the conspiracies between primary insurers and reinsurers alleged in the remaining claims. Indeed, the eight states that originally filed complaints did not include a global conspiracy claim, and only one of those states later amended its complaint to do so.

Most importantly, the Court of Appeals did not rely on the global conspiracy claim to accord these plaintiffs standing, but instead expressly held that the injury plaintiffs alleged they had suffered from the reinsurer-only conspiracies was sufficiently direct to confer standing. Thus, the prospect that plaintiffs may attempt to replead the global conspiracy claim neither diminishes the suitability of these cases for review by this Court nor overcomes the right of these defendants to be

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5 Because the global conspiracy claim was dismissed, plaintiffs' reliance on *Arizona v. Shamrock Foods*, 729 F.2d 1208 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985), and *Fontana Aviation v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980), is misplaced. Those cases deal with allegations of a vertical conspiracy including one level of conspirators with whom plaintiffs dealt. They are thus inapplicable to the reinsurer-only claims addressed by this petition.

free of presently pending claims that plaintiffs have no standing to pursue.

CONCLUSION

For the foregoing reasons and those set forth in the petition, a writ of certiorari should issue to the United States Court of Appeals for the Ninth Circuit to review that Court's judgment and opinion.

Respectfully submitted,

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